IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
May 6, 2004 Session

J. B. WILSON v. JAMES T. SMYTHE, ET AL.

Appeal from the Circuit Court for Davidson County
No. 00C-2057 Carol Soloman, Judge

No. M2003-00645-COA-R3-CV - Filed December 10, 2004

Employee and president of a closely held corporation seeks to enforce a purported oral agreement requiring the defendant to purchase his shares of stock in the corporation. Plaintiff claims *inter alia* that James T. Smythe orally agreed to purchase his shares for $300,000 in partial consideration for the plaintiff's continued employment. The trial court found the oral agreement enforceable and ordered Smythe to purchase the plaintiff's shares. We reverse finding that the purported oral agreement is unenforceable because it violated Tenn Code Ann. § 47-8-319, the statute of frauds, which was in effect in 1997 when the parties purportedly entered into the oral agreement.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Reversed and Remanded

FRANK G. CLEMENT, JR., J., delivered the opinion of the court, in which WILLIAM B. CAIN, and PATRICIA J. COTTRELL, JJ., joined.

James C. Wright, Knoxville, Tennessee, for the appellants, James T. Smythe, individually, McCann Steel Company, Inc.

Pamela M. Spicer, Nashville, Tennessee, for the appellee, J. B. Wilson.

OPINION

J.B. Wilson, an employee and president of a McCann Steel Company, Inc., a closely held corporation, filed this action to enforce a purported oral agreement whereby James T. Smythe agreed to purchase Wilson's shares for $300,000 upon Wilson's retirement. Wilson claims that Smythe entered into this agreement with Wilson in 1997 to entice Wilson to continue to serve as president of McCann Steel through 1999.

Wilson worked for McCann Steel for 59 years in various capacities, having starting with the company in 1940 at the age of 16. The company had been owned by the McCann family throughout

Wilson's employment until 1974 when they sold the company to Smythe.[1] Wilson was president of the company and responsible for day to day operations when Smythe purchased it in 1974. Smythe, who had not worked for the company, asked Wilson to continue to serve as president and chief operating officer of McCann Steel, offering Wilson 10% of the outstanding shares of stock in the company in addition to his salary, bonuses and benefits.[2] Wilson agreed and continued to serve as president and chief operating officer of McCann Steel until this dispute arose in February of 1999, the week of Wilson's planned retirement. The dispute pertains to a purported oral agreement entered into between Wilson and Smythe in January of 1997.

Wilson claims that in January of 1997 Smythe again enticed him to remain as president and chief operating officer of the company, this time until February 26, 1999, Wilson's 75th birthday. Wilson asserts that he and Smythe entered into an oral agreement in January of 1997, whereby: (1) Smythe and/or the company would purchase all of Wilson's shares for $300,000 upon Wilson's retirement, [3] (2) the company would write off a $12,000 debt Wilson owed the company, and (3) the company would transfer ownership of two company vehicles to Wilson. By Wilson's account, the oral agreement was sealed with a handshake.

Wilson submitted his resignation in February of 1999, as planned, at which time he asked Smythe to fulfill their oral agreement to purchase Wilson's shares and to forgive the $12,00 debt Wilson owed the company.[4] Wilson asserts that Smythe refused, telling Wilson he did not have the money.

Eleven months later, on January 25, 2000, Wilson mailed to Smythe a letter in which he summarized the elements of the purported oral agreement from 1997. Wilson's belated letter, dated three years after the alleged agreement, is the only writing supporting the purported agreement. The letter is signed by Wilson. It is not signed by Smythe.

Thereafter, Wilson brought this action seeking to enforce the purported agreement against McCann Steel and Smythe, individually. Sitting without a jury, the trial court ruled for Wilson,

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[1]Upon acquiring 100% of the shares of the company from the McCann family, Smythe gifted 75% of the outstanding shares of the company to members of his family and 10% to Wilson, as more thoroughly discussed hereinafter, retaining 15% for himself. Later on, Smythe transferred more of his shares, 11% of the outstanding shares, to a non-family member, leaving Smythe with 4% of the outstanding shares of the company.

[2]Though the company never issued shares of stock to Wilson, it is undisputed that Wilson has owned 10% of the outstanding shares since 1974.

[3]Wilson states that the purchase price was based on the fact that the Metropolitan Development Housing Authority had just purchased McCann Steel's property for $ 3 million. The record indicates that MDHA purchased the McCann Steel property along with numerous other adjoining tracts to facilitate the construction of a football stadium, which is now known as the Coliseum.

[4]Wilson had previously transferred title to the two company vehicles to himself; thus, it was not necessary to request transfer of the title to the two vehicles upon his retirement.

piercing the corporate veil of McCann Steel and awarding Wilson a $300,000 judgment against Smythe. The court also ordered Smythe to remove Wilson's $12,000 debt from the books of McCann Steel. The court credited the $100,000 loan from McCann Steel to Wilson as an off-set against the $300,000 judgment.[5] The net effect of the rulings resulted in a personal judgment against Smythe of $200,000 and Wilson being relieved of the $12,000 debt to the company.

The trial court found there was a writing evidencing the agreement and that the writing satisfied the statute of frauds; however, the trial court did not identify which document supported this conclusion.[6] The trial court also found the testimony of David Hall, McCann Steel's accountant, and Norma Divinny, McCann Steel's secretary and bookkeeper, sufficient evidence to establish the terms of the agreement.

The personal judgment against Smythe was due in part to the trial court's decision to pierce the corporate veil based on its conclusion that McCann Steel and Smythe were one and the same. The trial court found that there was no credible evidence of corporate meetings, board of director meetings or shareholder meetings, that Smythe never sought approval from the board of directors for his actions on the company's behalf, and that Smythe failed to maintain an arm's length relationship with McCann Steel, exercising complete dominion and control over McCann Steel to such an extent that McCann Steel lost its separate corporate identity.

On appeal, Smythe and McCann Steel contend that the purported 1997 agreement was unenforceable under Tenn. Code Ann. § 47-8-319, which codified the statute of frauds in effect in 1997 and which required that agreements pertaining to the sale or purchase of securities be in writing. Defendants further contend that the writing the trial court relied on to hold that the oral agreement is binding is insufficient to satisfy the statute of frauds because it was not signed by Smythe.

Wilson sets forth four arguments to support his position that the alleged agreement is enforceable. One, the Uniform Commercial Code statute of frauds Defendants rely on was repealed effective January 1, 1998, and was replaced by a statute Wilson contends is retroactive that does not require such agreements to be in writing; therefore, the statute of frauds is inapplicable. Two, the trial court found there was a written agreement between Smythe and Wilson memorializing the oral agreement which satisfied the statute of frauds. Three, the January 25, 2000, letter to Smythe satisfies the statute of frauds because it serves as a written confirmation of the agreement as permitted by Tenn. Code Ann. § 47-8-319(c). Four, the agreement is exempt from the statute of frauds because of the doctrines of partial performance, implied contract, and promissory estoppel.

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[5]The court credited the $100,000 corporate loan as an offset of the judgment against Smythe and ordered McCann Steel to forgive the $100,000 loan to Wilson.

[6]The failure of the trial court to identify the document that supported the trial court's finding that there was a written agreement was addressed by Wilson's counsel in oral argument. Wilson's counsel asserted that "the writing" was Wilson's 2000 letter recounting the transaction he sent to Smythe three years after the alleged oral agreement.

Standard of Review

An appellate court's review of a trial court's findings of fact is *de novo* upon the record of the trial court accompanied by a presumption of the correctness of the findings, unless the preponderance of the evidence is otherwise. Tenn. R. App. P. 13(d). Unless there is an error of law, we must affirm the trial court's decision as long as the evidence does not preponderate against the findings. *Umstot v. Umstot*, 968 S.W.2d 819, 821 (Tenn. Ct. App. 1997).

The weight, faith and credit to be given to a witness' testimony lies with the trial judge in a non-jury case because the trial judge had an opportunity to observe the manner and demeanor of the witness during their testimony. *Roberts v. Roberts*, 827 S.W.2d 788, 795 (Tenn. Ct. App. 1991); *Weaver v. Nelms*, 750 S.W.2d 158, 160 (Tenn. Ct. App. 1987). There is no presumption of correctness with respect to the trial court's conclusions of law. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996) and Tenn. R. App. P. 13(d).

Statute of Frauds

To unravel the issues presented, we will first determine whether the Uniform Commercial Code (UCC) statute of frauds in effect in 1997, codified in Tenn. Code Ann. § 47-8-319, applies to the transaction. In 1997, when the purported oral agreement was entered into, the UCC statute of frauds provided that a contract for the sale of securities is not enforceable by way of action or defense unless:

> (a) there is some writing signed by the party against whom enforcement is sought or by his authorized agent or broker sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price; or
> . . . .
>
> (c) within a reasonable time a writing in confirmation of the sale or purchase and sufficient against the sender under paragraph (a) has been received by the party against whom enforcement is sought and he has failed to send written objection to its contents within (10) days after its receipt; or . . . .

Tenn. Code Ann. § 47-8-319. This statute, however, was repealed effective January 1, 1998[7] and, at the same time Tenn. Code Ann. § 47-8-113, enacted in 1997, was to take effect. Effective January 1, 1998, Tenn. Code Ann. § 47-8-113 nullified the foregoing requirement that agreements for the sale or purchase of securities satisfy the UCC statute of frauds.[8] The new statute provides:

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[7] Tenn. Code Ann. § 47-8-319 was repealed effective January 1, 1998 by 1997 Public Acts, Chapter 79, § 1.

[8] It is undisputed that McCann Steel is a closely-held corporation. Closely-held stock is a security within the meaning of Chapter 8 of the UCC, thus the statute of frauds found at Tenn. Code Ann. § 47-8-319 is applicable. *Wakefield v. Crawley*, 6 S.W 3d 442, 445 (Tenn. 1999), Tenn. Code Ann.§ 47-8-102(1)(a)(ii) and (1)(b)(ii) (1996 Repl.).

> Notwithstanding the provisions of § 29-2-101 [the statute of frauds], a contract or modification of a contract for the sale or purchase of a security is enforceable whether or not there is a writing signed or record authenticated by a party against whom enforcement is sought, even if the contract or modification is not capable of performance within one (1) year of its making.[9]

The alleged agreement was entered into in January of 1997 and the effective date of the new statute and repeal of the former statute was January 1, 1998. Generally, statutes are to be applied prospectively in the absence of clear legislative intent to the contrary. *Van Tran v. State*, 66 S.W.3d 790, 797-798 (Tenn. 2001). *See also Nutt v. Champion International Corp.*, 980 S.W.2d 365, 368 (Tenn. 1998); *State v. Cauthern*, 967 S.W.2d 726, 735 (Tenn. 1998); *Shell v. State*, 893 S.W.2d 416, 419 (Tenn. 1995). Our Tennessee constitution provides that "no retrospective law, or law impairing the obligations of contracts, shall be made." Article I, Section 20. An exception exists for statues that are remedial or procedural in nature which are subject to retroactive application, *Kee v. Shelter Insurance*, 852 S.W.2d 226, 228 (Tenn. 1993); however, when a statute creates "a new right, eliminates a vested right, or impairs a contractual obligation its retrospective application is constitutionally forbidden." *Bryan v. Leach*, 85 S.W.3d 136, 143 (Tenn. Ct. App. 2001). Thus, retroactive application of the new statute would be impermissible if it creates a contract where none existed in 1997, because by doing so would impose "new duties" and create "new obligations" in violation of Article 1, Section 20 of the Tennessee Constitution, as construed by *Doe v. Sundquist*, 2 S.W.3d 919, 923 (Tenn. 1999).

Our supreme court dealt with a similar conflict, one resulting from the subsequent enactment of a savings statute and whether it applied retroactively, thereby trumping an existing policy of insurance that required insureds to bring suits on the policy within "one year after the loss or damage occurs after any claim is denied." *Kee,* 852 S.W.2d at 227. The insured in *Kee* complied with the policy by commencing the action within one year, however, the insured voluntarily dismissed the action. When the insured re-filed the action, Shelter moved to dismiss based on the contract's limitation-of-action provision. The insured relied on an amendment to the savings statute which became effective after the policy issued and the loss occurred, but before the original action was filed and the voluntary dismissal taken. If applied retrospectively, the savings statute saved the action because the amendment made the savings provision applicable to a limitation of action in contracts, which had not been the case under prior law. *Kee* found the savings statute remedial and therefore should be applied retrospectively unless by doing so would take away a vested right or existing obligation under the policy, the parties contract. 852 S.W.2d at 228. In its analysis the court considered that at the time the contract at issue was executed the insured would have been required to bring the suit within one year after the claim was denied and that under then existing Tennessee court decisions the savings statute did not apply to the contractual limitations such as the one at

[9]The comments to the official text explain the rational behind the new statute. "With the increasing use of electronic means of communication, the statute of frauds is unsuited to the realities of the securities business. For securities transactions, whatever benefits a statute of frauds may play in filtering out fraudulent claims are outweighed by the obstacles it places in the development of modern commercial practices in the securities business." *See* Comments To Official Text, Tenn. Code Ann. § 47-8-113.

issue. The court emphasized the significance of laws in existence at the time a contract is executed stating, "It is well established that the laws affecting enforcement of a contract, and existing at the time and place of its execution enter into and form part of the contract." 852 S.W.2d at 228.

> Those laws which in any manner affect the contract, whether its construction, the mode of discharging it, or which control the obligation which the contract imposes, are essentially incorporated with the contract itself . . . .
> . . .
> [T]he legal obligation of contracts – that is, the legal means of enforcing them, which constituted their legal obligation, or the legal obligement by which they were enforced – should not be impaired or weakened, or rendered less effective, than when the contract was entered into and the obligation imposed or taken upon the party . . . .

Kee, 852 S.W.2d at 228-229, quoting *Webster v. Rose*, 53 Tenn. 93 (1871). Finding retrospective application of the amendment to the savings statute improper, the *Kee* court stated:

> In the present case, the loss occurred, and therefore the contractual right accrued, nearly one year before the statutory amendment was adopted. At the time the insurance contract was executed and at the time of loss, the law of this state, as incorporated into the contract, required that the suit commenced within the contractually limited time be the suit prosecuted to judgment. The amendment, if applied retrospectively, negates that requirement and allows the policyholder to extend his cause of action, despite the fact that he failed to comply with the contractual obligation. Clearly, retrospective application of the amendment would impair the accrued contractual rights of the insuror. Accordingly, we conclude that where the contract was already executed and the contractual right accrued before the amendment's effective date, retrospectively applying the 1989 amendment impairs the obligation of contract and violates Article I, Section 20 of the Tennessee Constitution.

852 S.W.2d at 229.

If we were to apply the 1998 statute retroactively, we would be creating a right that Wilson did not have when the oral agreement was purportedly entered into, the right to now enforce what was an unenforceable contract under existing law in 1997. *Kee* makes it clear that such a result would be constitutionally impermissible, 852 S.W.2d at 229, and Article I, Section 20 prohibits us from making enforceable that which was unenforceable. We, therefore, find that retroactive application of Tenn. Code Ann. § 47-8-113 is constitutionally impermissible here because it would create a new right – the right to enforce what was an unenforceable contract when it was allegedly entered into. Accordingly, we hold that the 1997 statute of frauds embodied in Tenn. Code Ann. § 47-8-319 applies. Therefore, we must now determine whether the purported agreement complies with the statute of frauds or escapes its application under an exception to the statute of frauds.

The Requirement of a "Writing" in Tenn. Code Ann. § 47-8-319(a)

The trial court held that the letter from Wilson to Smythe dated January 25, 2000, was sufficient to satisfy Tenn. Code Ann. § 47-8-319(a).[10] Defendants insist that Wilson's letter, which was signed by Wilson but not Smythe, fails to satisfy the statute and, therefore, the trial court's conclusion of law on this point was error.

The ruling by the trial court that the letter satisfies Tenn. Code Ann. § 47-8-319(a) is a conclusion of law and we review a trial court's conclusions of law without a presumption of correctness. *Campbell v. Florida Steel Corp.*, 919 S.W.2d 26, 35 (Tenn. 1996) and Tenn. R. App. P. 13(d).

Subsection (a) of Tenn. Code Ann. § 47-8-319 had two components, the first of which is that there is a writing signed by "the party against whom enforcement is sought."[11] Here, Smythe is the party against whom enforcement is sought. The trial court held the 2000 letter from Wilson satisfied the "writing" component of the statute of frauds. The record before us clearly establishes that the letter at issue was not signed by Smythe, nor was any other writing sufficient to satisfy Tenn. Code Ann. § 47-8-319(a) signed by Smythe. Thus, Wilson failed to satisfy an essential component of subsection (a), that the writing be signed by Smythe, the party against whom enforcement is sought.

"Written Confirmation" under Tenn. Code Ann. § 47-8-319(c)

Wilson alternatively contends that his letter to Smythe in January of 2000 satisfies the "written confirmation" component of another subsection of Tenn. Code Ann. § 47-8-319, subsection (c).[12] Smythe and McCann Steel insist Wilson's letter is still deficient for it was not reasonably timely as the statute requires.

Subsection (c) provided another exception to the prohibition against oral contracts for the sale or purchase of securities and that was if "within a reasonable time a writing in confirmation of the sale or purchase" is provided to the party against whom enforcement is sought.[13] The obvious question then is whether Wilson's letter in confirmation of the sale or purchase was provided to Smythe "within a reasonable time."

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[10] The trial court did not identify the writing but the parties acknowledge that the 2000 letter from Wilson to Smythe is the writing at issue.

[11] This statute was repealed effective January 1, 1998 by 1997 Public Acts, Chapter 79, § 1.

[12] This statute was repealed effective January 1, 1998 by 1997 Public Acts, Chapter 79, § 1.

[13] Subsection (c) also required that the written confirmation be sufficient under paragraph (a) and be "received by the party against whom enforcement is sought and he has failed to send written objection to its contents within (10) days after its receipt." Tenn. Code Ann. § 47-8-319(c).

A confirming letter submitted by a person other than the party to be charged is an authorized exception to the statute of frauds. Exceptions to the statute of frauds are to be strictly construed so that its underlying policy provisions are not defeated. Ronald A. Anderson, *Anderson on the Uniform Commercial Code* 8-319:72 (3d ed. 1996 Revision). The written confirmation may be in the form of a letter, broker's confirmation slip, or a seller's invoice. *Anderson* at § 8-319:86. To qualify as a written confirmation under Tenn. Code Ann. § 47-8-319(c), the writing must contain the same information that would make it sufficient under subsection (a). A writing that is indefinite or contemplates a future transaction is not sufficient. *U.C.C.* at 8-319:87. Furthermore, the written confirmation must be sent within a "reasonable time."

To satisfy the "reasonable time" criteria one must dispatch the confirming writing "within a reasonable time after the occurrence of the alleged oral transaction." *Anderson* at § 8-319:88. Anderson explains that the object of this time limitation is to ensure that the recipient of the confirmation will associate the confirmation with the prior oral transaction:

> What is a reasonable time for sending a letter confirming an oral contract is not a matter to be decided in a vacuum but is to be determined in the light of all the circumstances of the case and of the obligation of the parties to act in good faith. When there is a reasonable cause for delay in putting anything in writing, a delay in sending a written confirmation will not be held unreasonably delayed by merely counting the number of days.

Id. at § 8-319:88.

"What is a reasonable time for taking any action depends on the nature, purpose and circumstances of such action." Tenn. Code Ann. § 47-1-204(2). Though this criteria is not amenable to a "bright line" test, we are unable to envision a circumstance whereby a three-year delay in submitting written confirmation would be within a reasonable time.

An additional circumstance undermines Wilson's belated written confirmation: Wilson mailed the letter *after* Smythe had denied the purported agreement and refused to purchase Wilson's shares. Tenn. Code Ann. § 47-8-319(c), upon which Wilson relies, not only required that "within a reasonable time a writing in confirmation of the sale or purchase and sufficient against the sender under paragraph (a) has been received by the party against whom enforcement is sought," it also provided that the party receiving the written confirmation may "send written objection to its contents within (10) days after its receipt" to nullify the effect of the written confirmation. Here, Smythe had already nullified the purported agreement prior to the letter being sent. Thus, the mechanics provided for in subsection (c) were frustrated not only by the tardiness of Wilson's letter but also by the fact the letter was sent *after* Smythe had denied the agreement.

For these reasons, we find that Wilson failed to comply with the letter and spirit of Tenn. Code Ann. § 47-8-319(c). Accordingly, Wilson is not afforded the benefit of the written confirmation exception.

The "Partial Performance" Exception

Wilson also argues that the agreement should be excepted from the statute of frauds under the doctrine of "partial performance" for two reasons. One, Wilson contends that Smythe partly performed his part of the agreement by paying Wilson the $100,000 contemplated in the agreement. Two, Wilson contends that he fully performed his part of the agreement by continuing to serve as the company's president until the company moved to its new facility. Smythe counters, arguing that the record does not indicate any *quid pro quo* for the alleged agreement especially in the form of Wilson agreeing to remain with the company in return for Smythe's agreement to buy his stock. Further, Smythe argues that it is erroneous for Wilson to argue that the $100,000 "loan" constitutes partial performance because it was a loan, not partial payment for the shares.

The equitable doctrine of partial performance is to be applied with care and balance. *See Shedd v. Gaylord Entertainment Company*, 118 S.W.3d 695, 698 (Tenn. Ct. App. 2003). If the doctrine is too liberally applied, it could easily result in the exception of partial performance swallowing the rule of the statute of frauds, allowing the proliferation of evils the statute was created to guard against. 118 S.W.3d 695, 698 (Tenn. Ct. App. 2003).

Determining whether or not there was a part performance of a contract depends upon the particular facts of each case. *Foust v. Carney*, 329 S.W. 2d 826, 829 (1959). To constitute partial performance that will take an oral contract for the sale of securities out of the statute of frauds, "the buyer must perform an act directly related to the stock, such as accepting delivery of the stock, registering the stock, or partially paying for it." *Anderson* at § 8-319:78. Performing services "pursuant to an oral contract does not constitute 'part performance' that will take an oral contract for the sale of securities out of the statute of frauds." *Anderson* at § 8-319:79 (citing *Beta Drilling, Inc. v. Durkee*, 821 S.W.2d 739 (Tex. Ct. App. 1992)). *Beta* relied heavily on the rationale of another Texas case, *Wiley v. Bertelsen*, 770 S.W.2d 878, 882 (Tex. Ct. App. 1989) in denying the president and chief executive officer's employment with the company as an act sufficient to constitute partial performance. The test set out in *Wiley* stated:

> Performance of an alleged oral agreement in order to remove the agreement from the operation of the statute of frauds, must be unequivocally referable to the agreement and corroborative of the fact that a contract actually was made. (citations omitted). What is done must itself supply the key to what is promised. Rendition of services for which a person receives a monthly salary is insufficient to take the alleged agreement out of the statute of frauds because the services were fully explained by the salary without supposing any additional consideration. (citations omitted).

Wiley, 770 S.W.2d at 882.

A different result was reached in *Schnider v. Carlisle Corporation*, 65 S.W 3d 619 (Tenn. Ct. App. 2001) wherein this court used the doctrine of partial performance to enforce an agreement that did not comply with the statute of frauds. The key difference between *Schnider*, which held for

the employee/plaintiff, and *Beta* and *Wiley* and the facts presented here is the fact that the company with which Mr. Schnider made the agreement by which he would acquire shares for his continued employment also performed its part of the agreement in addition to the employee performing his part of the purported agreement. Schnider was a chef who agreed to serve as a restaurant's manager in exchange for a salary, benefits and 15% of the shares of the company. The terms of Schnider's employment were set forth in an unsigned "Final Draft" agreement. Although the agreement was not signed by either party, the parties' stipulated to its terms. The agreement provided Schnider with a three-year employment term, salary and car allowance, 15% stock ownership in the new venture, health insurance and bonuses. Schnider went to work immediately, but was discharged within 5 months. Upholding the agreement, this court found that both parties had performed under the agreement. The court held that Schnider devoted his time to operating the restaurant and thus fully performed and Carlisle partially performed in that it paid Schnider the car allowance, benefits, and salary called for in the agreement. Although Carlisle did not issue stock certificates evidencing Schneider's ownership, Carlisle identified Schneider as a 15% shareholder in documents signed under oath and filed with the State of Tennessee Alcoholic Beverage Commission.

The evidence offered by Wilson as proof of partial performance by the parties was the remittance to him of $100,000 by McCann Steel and his continued employment.[14] Wilson contends the $100,000 was remitted as partial payment of the $300,000 purchase price for his shares of stock. The problem with this contention is that the parties treated the remittance as a "loan" of $100,000. The company's financial records identified the remittance as a loan. David Hall, the company's accountant, testified that the $100,000 remittance was a loan. Smythe also testified that the remittance was a loan and it was not a payment for Wilson's shares. With the sole exception of Wilson's testimony, the evidence establishes that the $100,000 remitted to Wilson was a loan, nothing more, nothing less. Thus, the evidence preponderates against a finding that the $100,000 "loan" was anything but that, a loan.

It is undisputed that Wilson continued to receive his salary and benefits while employed during the two years he claims to have been partially performing the purported agreement. Therefore, Wilson's continued employment, for which he was compensated, does not supply "the key to what was promised" and, thus, does not satisfy the partial performance exception. There being no other evidence of partial performance, we find the evidence preponderates against a finding that the parties partially performed the agreement.

Implied Contract

Wilson asserts that the purported agreement should be enforced as an implied contract. An express contract is created by the parties' actual assent to mutually acceptable terms. *Engenius*

[14] Wilson also contends that his act of furnishing his own transportation benefitted the company and qualifies as partial performance. This contention is undermined by the fact that the vehicles Wilson used for his transportation had been company vehicles; however, Wilson transferred the title of both vehicles to himself for no consideration. Based on these facts, we find this argument without merit, if not disingenuous.

Entertainment, Inc. v. W.W. Herenton, 971 S.W.2d 12, 18 (Tenn. Ct. App. 1997). In contrast, "a contract implied in law is imposed by operation of law, without regard to the assent of the parties, on grounds of reason and justice." *Scandlyn v. McDill Columbus Corp.*, 895 S.W.2d 342, 345 (Tenn. App. 1994) (quoting *Continental Motel Brokers, Inc. v. Blankenship*, 739 F.2d 226, 232 (6th Cir.1984)). Elements of a cause of action for implied contract include:

> A benefit conferred upon the defendant by the plaintiff, appreciation by the defendant of such benefit, and acceptance of such benefit under such circumstances that it would be inequitable for him to retain the benefit without payment of the value thereof. The most significant requirement for a recovery . . . is that the enrichment to the defendant be unjust.

Haynes v. Dalton, 848 S.W.2d 664, 666 (Tenn. App.1992) (quoting *Paschall's, Inc. v. Dozier*, 407 S.W.2d 150, 155 (1966)).

In this case Wilson, has failed to prove the elements necessary to prove an implied contract. First, the only benefit to Smythe and/or McCann Steel that he can prove is his continued employment with the company, yet Wilson was paid for his services. Since Wilson was paid for his services, it would not be inequitable for the defendants to retain the benefit of his services unless he was substantially underpaid and there is no evidence that Wilson was under-compensated for his services that would give rise to an equitable argument. Review of the record does not show that a benefit was conferred upon the defendants by Wilson, or that there was an appreciation of such by the defendants, or that there was an acceptance of any such benefit by the defendants under such circumstances that it would make it inequitable for them to retain such benefit without payment of the value thereof. As stated in *Haynes*, the most significant requirement for such a recovery is that the enrichment to our defendants be unjust. There is simply no evidence in this record that would justify such a conclusion. 848 S.W.2d at 666. We therefore find that Wilson failed to establish that an implied contract existed with Smythe or with McCann Steel.

Promissory Estoppel

Wilson also contends that the alleged agreement should be upheld under the doctrine of promissory estoppel. He argues that this is justified because Smythe received the benefit of Wilson's continued service to the company from February, 1997, the date of the alleged agreement, until Wilson's retirement in February, 1999. Wilson insists that he relied on the agreement, continuing to work for the company, and that it would be unjust to allow Smythe and/or McCann Steel to escape liability on the basis that there was no agreement or that the agreement is not enforceable because it fails to comply with the statute of frauds.

Like an implied contract claim, a claim of promissory estoppel is not dependent upon the existence of an express contract between the parties. *Engenius Entertainment, Inc.* at 19. Promissory estoppel is explained as follows: "A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee . . . , and which does induce such

action or forbearance, is binding if injustice can be avoided only by enforcement of the promise. *Calabro v. Calabro*, 15 S.W.3d 873, 878 (Tenn. Ct. App. 1999), citing *Amacher v. Brown-Forman Corp*., 826 S.W.2d 480, 482 (Tenn. Ct. App. 1991) (quoting Restatement (Second) of Contracts § 90); *see also Alden v. Presley*, 637 S.W.2d 862, 864 (Tenn. 1982). Another explanation of promissory estoppel is

> when one . . . by his promise induces another to change his situation, a repudiation of the promise would amount to a fraud. Where one makes a promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee, and where such promise does in fact induce such action or forbearance, it is binding if injustice can be avoided only by enforcement of the promise.

Foster & Creighton Co. v. Wilson Contracting Co., 579 S.W.2d 422, 427 (Tenn. Ct. App.1978) (citing 17 C.J.S. Contracts § 74); see also *Restatement (Second) of Contracts* § 90(1) (1979). In addition to showing that the defendant made a promise upon which the plaintiff reasonably relied, the plaintiff must show that this reliance resulted in detriment to the plaintiff. *Foster & Creighton Co.* at 427. Estoppel has been applied in "exceptional cases where to enforce the statute of frauds would make it an instrument of hardship and oppression, verging on actual fraud." *Baliles v. Cities Services Company*, 578 S.W.2d 621, 624 (Tenn. 1979). There are limits to the application of promissory estoppel:

> Detrimental action or forbearance by the promisee in reliance on a gratuitous promise, within limits constitutes a substitute for consideration, or a sufficient reason for enforcement of the promise without consideration. This doctrine is known as promissory estoppel. A promisor who induces substantial change of position by the promisee in reliance on the promise is estopped to deny its enforceability as lacking consideration. The reason for the doctrine is to avoid an unjust result, and its reason defines its limits. No injustice results in refusal to enforce a gratuitous promise where the loss suffered in reliance is negligible, nor where the promisee's action in reliance was unreasonable or unjustified by the promise. The limits of promissory estoppel are: (1) the detriment suffered in reliance must be substantial in an economic sense; (2) the substantial loss to the promisee in acting in reliance must have been foreseeable by the promisor; (3) the promisee must have acted reasonable in justifiable reliance on the promise as made.

Calabro, 15 S.W.3d at 879, quoting *Alden v. Presley*, 637 S.W.2d 862, 864 (citing L. Simpson, Law of Contracts § 61 (2d ed. 1965)).

Wilson had to prove that the detriment he suffered in reliance on Smythe's promise was substantial in an economic sense; however, we find that Wilson failed to establish this element of promissory estoppel. He had been an employee of McCann Steel for 57 years when the agreement was purportedly entered into. The purported agreement called for him to work two additional years.

Instead of making a change to his economic detriment, Wilson continued in the same position, as before, and continued to receive his salary and benefits, as before. Moreover, Wilson had owned the shares for 23 years – without an agreement with Smythe or McCann Steel to purchase his shares – and at the end of the two year period at issue he owned the shares, as before. Thus, the evidence preponderates against a finding that Wilson suffered a substantial economic loss by working for McCann Steel during the two years at issue. Accordingly, we find that Wilson failed to establish a *prima facie* case of promissory estoppel.

Additional Issues Raised by Appellants

Appellants Smythe and McCann Steel raised two additional issues which relate to corporate management and piercing the corporate veil. Our rulings above render such issues moot**.** Therefore, they are not discussed.

In Conclusion

The evidence in this case preponderates against the ruling of the trial court. The agreement asserted by Wilson is unenforceable because it fails to comply with Tenn. Code Ann. § 47-8-319 of the statute of frauds and does not fit within any exception. Because the agreement is unenforceable on that basis, it is not necessary to examine whether the agreement violated laws relating to conflict of interest transactions by an officer or director. In that Smythe is not liable, it follows that there is no justification to pierce the corporate veil. Since the agreement under which the $100,000 loan from McCann Steel to Wilson and Wilson's $12,000 debt to McCann Steel would be forgiven cannot be enforced, these debts cannot be offset or forgiven based upon an unenforceable agreement.

Costs of appeal are assessed against the appellee, J. B. Wilson.

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FRANK G. CLEMENT, JR., JUDGE